BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of:	)	
	)	
Implementation of Sections of	)	
the Cable Television Consumer	)	MM Docket No. 92-266
Protection and Competition	)	
Act of 1992	)	
	)	
Rate Regulation	)	

PETITION FOR STAY

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Dated: July 28, 1993

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SUMMARY

The Coalition of Small System Operators, Prime Cable of Alaska, L.P., and the Community Antenna Television Association, Inc. submit this Petition for Stay of the Federal Communications Commission's cable television rate regulations. The Commission's implementation of its rate regulations as set forth in its Rate Report and Order, without revision and absent final standards to guide the Petitioners through a cost-of-service analysis, will irreparably harm the Petitioners and their members. The Petitioners will likely succeed on the merits of their argument on reconsideration or on appeal, and the equities favor granting the stay.

"micromanagement" of the affairs of an independent agency. */ This is inappropriate interference by members of Congress.

In addition, the benchmark tables adopted by the Commission are based on seriously flawed methodology. Not only are there inaccuracies in the data the Commission used to develop the benchmarks, but the Commission's sample of small competitive cable systems is so limited that the benchmarks are wholly arbitrary. And in establishing the benchmarks, the Commission improperly included a significant number of municipal systems as well as private systems engaged in "price wars", both of which tend to charge rates lower than competitive systems can charge in the long run. Finally, the rules are arbitrary because non-competitive systems are required to reduce rates to levels below the rates charged by many competitive systems.

Despite the inherent problems with the benchmarks, the Commission has not afforded the Petitioners with a viable alternative to the benchmarks since it has not yet concluded its rulemaking regarding a cost-of-service analysis. The Petitioners are left with the daunting prospect of either lowering rates to levels required under the benchmarks (which, in many instances will drive the Petitioners into significant loss situations, put them into default of their bank loans, and may even force them out of business), or conduct a hypothetical cost-of-service analysis without standards to guide them, in the face of threats that they may be forced

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*/ See David S. Broder and Stephen Barr, "Hill's Micromanagement of Cabinet Blurs Separation of Powers," The Washington Post, July 25, 1993, at A1, 16-17.

later retroactively to reduce their rates below benchmark levels. Operators that choose to reduce rates under the flawed benchmarks will never be able to recoup their losses should the benchmarks ultimately be revised.

For these reasons, the Petitioners respectfully submit that the Commission should stay the implementation of the cable television rate regulations until 60 days after the Commission acts to reconsider the benchmark rates and promulgates cost-of-service standards. Because the rate freeze has injured many cable operators by preventing justified rate increases, the freeze should not be extended beyond November 15, 1993. Cable operators increasing their rates prior to the Commission's action on reconsideration and the conclusion of the cost-of-service proceeding could be required to track revenues and rollback or refund any excessive increases, as determined according to the Commission's final rules.

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To: The Commission

PETITION FOR STAY

The Coalition of Small System Operators (the "Coalition") 1/, Prime Cable of Alaska, L.P. ("Prime Cable") 2/, and the Community Antenna Television

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1/ The Coalition of Small System Operators consists of: ACI Management, Inc.; Balkin Cable; Buford Television, Inc.; Classic Cable; Community Communications Co.; Douglas Communications Corp. II; Fanch Communications, Inc.; Frederick Cablevision, Inc.; Galaxy Cablevision; Harmon Communications Corp.; Horizon Cablevision, Inc.; Leonard Communications, Inc.; MidAmerican Cable Systems, Limited Partnership; Mid-American Cable Television Association; Midcontinent Media, Inc.; Mission Cable Company, L.P.; MW1 Cablesystems, Inc.; National Cable Television Cooperative, Inc.; Phoenix Cable, Inc.; Rigel Communications, Inc.; Schurz Communications, Inc.; Star Cable Associates; Triax Communications Co.; USA Cablesystems, Inc.; and Vantage Cable Associates. Coalition members own and operate approximately 2,784 headends (representing more than a quarter of the headends in the country), serving approximately 1,297,856 subscribers. Coalition member Mid-American is an association of cable operators serving 1,458,644 subscribers in 1,479 communities located in Kansas, Missouri, Nebraska and Oklahoma. The members of Mid-America have 918 systems with less than 1,000 subscribers. The National Cable Television Cooperative is a purchasing cooperative which represents 360 small and mid-size independent cable companies. These companies together serve more than 2.8 million subscribers in over 2,300 communities nationwide. The Coalition participated in the rate regulation

Association, Inc. ("CATA") 3/ (collectively, "Petitioners"), hereby petition the Federal Communications Commission pursuant to 47 C.F.R. §§ 1.44(e) and 1.62(n), for a stay of its Rate Report and Order 4/ in the above-referenced proceeding. To the extent that a stay requires reversal of the Commission's Revised Implementation Order of July 27, 1993, 5/ which moved the implementation date for rate regulation up from October 1 to September 1, 1993, such a reversal is also requested. A stay is requested pending consideration and resolution of the issues raised herein regarding the irrationality of the benchmarks adopted by the Commission and pending completion of the proceeding recently initiated by the Commission to set standards for cost-of-service showings. To give time to make decisions and any rate adjustments that are necessary, the Petitioners request that the stay extend until 60 days after the Commission acts on the Petitioners' petitions for reconsideration of the Rate Report & Order and concludes its cost-of-service rulemaking.

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rulemaking by filing comments (dated January 27, 1993) and reply comments (dated February 11, 1993).

2/ Prime Cable of Alaska, L.P., which owns and operates a cable system in Anchorage, Alaska, is participating in this Petition for Stay because of its common interest in ensuring that the Commission's regulations adequately account for the needs of cable operators whose characteristics are likely to result in above-average costs. See Affidavit of Rudolph H. Green ¶ 5, attached hereto as Exhibit A ("Prime Cable's costs in Alaska are considerably higher than the costs for the typical cable system in the lower 48 states").

3/ CATA is a trade association representing cable television systems serving approximately 80 percent of the subscribers in the United States.

4/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, 58 Fed.Reg. 29,736 (FCC 1993) ("Rate Report and Order").

5/ Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Docket No. 92-266 (1993) ("Revised Implementation Order").

As explained more fully below, a stay is warranted because implementation of the Commission's Rate Report and Order will cause irreparable harm to the Petitioners, the Petitioners are likely to succeed on the merits of their petitions for reconsideration or on review by the Court of Appeals, 6/ and the balance of the equities favors granting a stay. Because the rate freeze that has been in effect since April 5, 1993, has severely damaged many operators that need to raise rates to keep up with rising expenses, it is requested that the freeze not be extended beyond its current expiration date of November 15, 1993. 7/ Instead, operators that choose to raise rates after November 15 should be required to keep track of revenues to permit refunds to subscribers if their rate increases are later found to be unjustified.

I. BACKGROUND

On April 1, 1993, the Commission adopted a three-part rate regulation scheme for cable television operators under the Cable Television Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). Pub L. No. 102-385. The regulatory structure involved first a temporary freeze on any rate increases -- originally from April 5 to August 3, 8/ and later extended to November 15, 1993. 9/

6/ See Petitions for Reconsideration submitted in Docket No. 92-266 by the Coalition and CATA, June 21, 1993.

7/ By order dated April 5, 1993, the Commission froze any increases in regulated cable rates for 120 days, until August 3, 1993. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, 58 Fed. Reg. 17,530 (FCC 1993) ("Freeze Order"). The freeze was extended to November 15, 1993, by an order published on June 18 1993. Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, , 58 Fed. Reg. 33,560 (FCC 1993) ("Stay Order").

8/ Freeze Order.

9/ Stay Order.

Second, the Commission relied on a system of price caps, based on rates set according to price benchmarks. 10/ Under the price cap/benchmark system, cable operators must compare their rates to benchmarks derived by the Commission from price information submitted to the FCC, primarily by cable systems subject to "effective competition" under the 1992 Cable Act definitions. The benchmarks were set without regard to costs. If a cable system's rates are above the benchmarks, the cable operator must either (1) reduce the rates to the benchmark level or to a level of 90 percent of the system's rates as of September 30, 1992, whichever is higher, 11/ or (2) justify its rates under a "cost-of-service" showing. The Rate Report & Order, which including appendices contains more than 500 pages, has 50 pages of forms and instructions for comparing cable rates to the benchmarks. At a televised tutorial on the benchmarks on May 13, 1993, FCC staff members took more than an hour to explain how to complete the forms. See Declaration of Dean Wandry, attached hereto as Exhibit B. 12/ The price cap/benchmark system was originally scheduled to go into effect on June 21, 1993.

The Commission initiated a rulemaking on July 16, `1993, to establish standards for cost-of-service showings. 13/ The comment period in the rulemaking will not expire until September 14, 1993. Pending adoption of standards in the cost-of-service rulemaking, the Commission stated that regulatory authorities

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10/ Rate Report & Order.

11/ See id. at Appendix A, Executive Summary, at ¶ 51.

12/ The Declaration of Dean Wandry and certain other declarations attached to this Petition as Exhibits have not yet been executed. In all instances, the declarations have been approved by the declarants. Executed copies will be provided to the Commission as soon as they are available.

would "review cost-of-service showings by cable operators on a case-by-case basis under general cost-of-service principles." 14/ The meaning of "general cost-of-service principles" is not further explained, and the issue of how they can be applied to cable television operations is the overriding issue of the rulemaking. Should a cable operator's attempt to justify its rates on a cost-of-service basis fail, the Commission has threatened that its rates may be reduced below the benchmark level. 15/

The Coalition and Prime submitted a Petition for Stay to the Commission on the morning of June 11, 1993. The Petition argued that (1) small system cable operators were having extreme difficulty completing the benchmark calculations by the proposed effective date; (2) cable operators could not make an intelligent decision between the benchmark and cost-of-service methodologies in the absence of knowing what cost-of-service standards would be applied; (3) an incorrect reliance on the (unknown) cost-of-service principles could result in rates even lower than the benchmark level; (4) the benchmarks were seriously flawed; and (5) reducing rates to the benchmark levels would in many cases be confiscatory.

Later on June 11, the day the Petition for Stay was filed, the Commission granted a stay of the rules until October 1, 1993. See Stay Order.

14/ Id. at n.9.

15/ When a cable operator elects to make a cost-of-service showing we will permit local authorities to prescribe any rate that is justified by the cost showing, including a rate lower than the benchmark or the operator's current rate level. Thus, when electing a cost-of-service showing, the cable operator assumes the risk that its rate could be lowered if such action is justified by the cost showing.

Rate Report & Order at ¶ 272.

Although dismissing without prejudice the Petitioners' stay petition, 16/ the Commission specifically noted: "we believe that an additional period of time [until October 1] afforded to cable operators to establish compliance with rate regulation requirements, including necessary rate reductions, and to prepare and disseminate subscriber notices, will promote the purposes of the Cable Act of 1992 and facilitate the transition to rate regulation of cable service." Id. at ¶ 3. Chairman Quello was reported to have noted that the deferral of the effective date would be "of particular help to small systems, giving them time to adjust to new regulations." Communications Daily, June 14, 1993, Vol. 13, No. 113, at 1.

On July 27, 20 days after publication of the Commission's deferral of

the 1992 Cable Act, the conferees had included a statement indicating their intention that the FCC implement the Act by September 1. 139 Cong. Rec. H4377 (June 30, 1993). And several members of subcommittees with oversight responsibilities over the Commission had made similar demands in correspondence to the Commission. See Letter to Chairman Quello from Senator Daniel K. Inouye, June 16, 1993, attached hereto as Exhibit D, and Letter to Chairman Quello from Congressman Edward J. Markey, July 7, 1993, attached hereto as Exhibit E.

In his separate statement to the Revised Implementation Order, Chairman Quello indicated again that he "would have let the October 1 date stand." Separate statement of Chairman James H. Quello, attached hereto as Exhibit F. But he felt it necessary to "balance" against that view "the prospect that failure to heed Conference Report language could lead to additional budget cuts for the Commission." In the end, the Chairman "chose not to gamble with the FCC's future by retaining the October 1 effective date." Id. Despite having stated publicly on June 30, 1993, that it could not reasonably implement rate regulation by September 1, 17/ 39 days later the Commission moved the effective date up by 30 days.

II. A STAY OF THE RATE REGULATIONS IS REQUIRED

Considering requests to stay its rulings, the Commission has cited the standards articulated by the Court of Appeals for the District of Columbia Circuit. See, e.g., Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking, Docket No. 92-266, (1993) (citing Virginia Petroleum JobbersAss'n v. FPC, 259 F.2d 921 (D.C. Cir. 1958), and Washington

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17/ See letter from FCC to John D. Dingell, June 30, 1993, reprinted in 139 Cong. Rec. H4472 (daily ed. July 1, 1993) ("June 30 Letter"), attached hereto as Exhibit G.

Metro. Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977)).

Under those decisions, the question whether a stay is warranted is governed by

742 F.2d 1561, 1565 (D.C. Cir. 1984), cert. denied, 471 U.S. 1074 (1985). See also Air Transp Ass'n of Am. v. Department of Transp., 900 F.2d 369, 375 (D.C. Cir. 1990) ("an agency [may] forgo notice and comment only when the subject matter or the circumstances of the rulemaking divest the public of any legitimate stake in influencing the outcome"). In Environmental Defense Fund, Inc. v. Gorusch, 713 F.2d 802, 816 (D.C. Cir. 1983), the D.C. Circuit stated that "an agency decision which effectively suspends the implementation of important and duly promulgated standards . . . constitutes rulemaking subject to notice and comment requirements of 5 U.S.C. § 553." If suspending implementation of standards is rulemaking requiring notice and comment, 18/ moving up the implementation date for rate regulation is unquestionably also rulemaking with similar notice and current requirements.

In this case, the Commission acted entirely without notice or public input. The Commission did not publish its proposal in the Federal Register (as required). Nor were interested parties, like the Petitioners, given any opportunity to comment.

b. The Commission Acted Without A Record And Contrary To Its Own Declarations.

By acting outside of prescribed rulemaking procedures, the Commission failed to develop any record at all supporting its action. See, e.g., Home Box Office, Inc. v. FCC, 567 F.2d 9, 36 (D.C. Cir.), cert. denied, 434 U.S. 829 (1977) (record must "enable us to see what major issues of policy were ventilated by the informal proceedings and why the agency reacted to them as it did") (quoting

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18/ The Commission's decision to defer its implementation date to October 1, 1993, was made within 30 days of the effective date of its earlier decision to set June 21 as the implementation date. See 58 Fed. Reg. 29,533 (May 21, 1993) and 58 Fed. Reg. 33,560 (June 18, 1993). Therefore, no additional notice and comment proceeding was required at that time. See 47 C.F.R. § 1.108 and discussion infra..

Automotive Parts & Accessories Ass'n v. Boyd, 407 F.2d 330, 338 (D.C. Cir. 1968)). Accord International Brotherhood of Teamsters v. United States, 735 F.2d 1525, 1531 (D.C. Cir. 1984) ("when an agency seeks to change a settled policy, the record must at least indicate what led it to make the change"). To the contrary, the record developed prior to the Commission's grant of a stay of its regulations in June strongly supported a stay at least until October 1. The Coalition and Prime had sought a stay, clearly articulating how premature effectiveness of the rules would injure numerous cable operators, especially many small cable operators and other operators in high cost areas. See Petition for Stay, submitted by the Coalition of Small System Operators and Prime Cable of Alaska, L.P., June 11, 1993.

When the Commission determined to stay the effectiveness of its rate regulations until October 1, it recognized that a deferral of the effective date would help cable systems that were having difficulty complying with such complex rules in a short time. Stay Order. And the Commission never changed its view that a time period at least until October 1 was necessary. As recently as June 30, 1993, the FCC stated in a letter to Congress that implementing the rules prior to October 1 would be "inconsistent with due process," would "reflect on the integrity and efficiency of the Commission's processes," and would be at odds with the many parties who "are now proceeding on the understanding that implementation will not occur prior to October 1." June 30 Letter, attached hereto as Exhibit G.

c. The Views Of Individual Members of Congress. As

regarding the rules' effective date. Pub. L. No. 10340. The conference agreement did contain language expressing the "conferees" intention that the FCC implement the Act no later than September 1. Cong. Rec. H4377 (daily ed., June 30, 1993). But the intention of the House and Senate conferees cannot pass for law. International Brotherhood of Elec. Workers, Local Union No. 474 v. NLRB, 814

the Commission provide him by July 9 "with its adjusted time table." See Exhibit E. Although the written record does not contain any explicit threats to the Commission's funding tied to the implementation date for cable rate regulation, Chairman Quello obviously understood the threat well-enough. He explicitly noted in the Commission's press release concerning the revised implementation date, as well as in his separate statement to the Revised Implementation Order, that the only reason he agreed to the change was the threat of Congressional retaliation in the form of funding cuts. See Exhibits C and F. To be sure, this pressure from Congress put the Commission in an extremely difficult position, and one that the Commission well understood would invite legal challenge. 19/ But these are not legitimate excuses for running roughshod over statutory procedural requirements.

In the seminal case of D.C. Federation of Civic Associations v. Volpe, 459 F.2d 1231, 1247 (D.C. Cir), cert. denied, 405 U.S. 1030 (1972), the D.C. Circuit invalidated an agency decision tainted by improper congressional influence. The Court's inquiry hinged on the existence of pressure from Congress and its effect on the decision-making process: "[T]he decision would be invalid if based in whole or in part on the pressures emanating from [a member of Congress]." 20/ Id. at 1246. See also Sierra Club v. Costle, 657 F.2d 298, 409 (D.C.

19/ See June 30 Letter, supra ("a chaotic rush to regulation by an understaffed and underfinanced Commission would reflect on the integrity and efficiency of the Commission's processes, and result in a flood of legal challenges . . ."), attached hereto as Exhibit G.

20/ D.C. Federation involved a case, like this one, where the underlying agency action was not judicial or quasi-judicial in nature. 459 F.2d at 1246. As a result, the pressure from Congress needed to have some effect in order to require invalidation. Had the agency action been judicial or quasi-judicial, improper congressional pressure would have mandated invalidation regardless of its actual effect. See Pillsbury Co. v. Federal Trade Comm'n, 354 F.2d 952, 963-64 (5th Cir. 1966).

Cir. 1981) ("administrative rulemaking may be overturned . . . [if] the content of the pressure upon the [agency] is designed to force [it] to decide upon factors not made relevant by Congress in the applicable statute . . ." and if the agency's decision is "affected by those extraneous considerations").

Viewing this case in light of D. C. Federation and its progeny, it is clear that the Commission's decision must be reversed. "[T]he proper focus is not on the content of congressional communications in the abstract, but rather upon the relation between the communications and the adjudicator's decisionmaking process." Peter Kiewit Sons Co. v. United States Army Corps of Engineers, 714 F.2d 163, 169-70 (D.C. Cir. 1983). The admonition in the conference report and the implicit threats contained in letters from members of Congress to the Commission are clearly attempts to exert improper pressure. When the Commission yields to such influence -- as it plainly acknowledges doing in this case -- resulting decisions are void.

e. The Commission's Action Cannot Be Seen As A Reconsideration Of Its Stay Decision.

Section 1.427(a) of the Commission's Rules provides that Commission actions become final on the date of public notice -- in this case, June 18, 1993, the date the Stay Order was published in the Federal Register. 47 C.F.R. § 1.427(a). Under Section 1.108, "[t]he Commission may, on its own motion, set aside any action made or taken by it within 30 days from the date of public notice of such action . . . ." 47 C.F.R. § 1.108. That 30 days expired in this case on July 18. Accordingly, the Commission could not legally reconsider its action after that date.

In its Revised Implementation Order, the Commission suggests that it retained jurisdiction to grant reconsideration on its own motion because petitions for reconsideration of the Rate Report and Order were pending. But

petitions to reconsider that earlier order cannot possibly be found to toll running of the 30-day period for finality of the later Stay Order. Moreover, the only citations provided by the Commission for its bizarre interpretation involved adjudications, where there was no question of the adequacy of a record in support of the sua

2. **The Benchmark Tables Adopted By The Commission's Rate Regulation Order Are Seriously Flawed, And The Commission Has Not To Date Provided Any Viable Alternative Form Of Rate Regulation As Required By The Statute.**

On May 3, 1993, the Commission released its Rate Report and Order explaining the system of rate regulation it had adopted under Section 623(b) of the Communications Act of 1934, as amended by the Cable Television Consumer Protection and Competition Act of 1992. The Commission's rate regulation uses a combination of price caps and cost-of-service analysis. For both basic and tiered services, the Commission created "benchmarks" based on its determinations of the ranges of rates for systems subject to competition. Because "the Commission cannot be certain that the initial capped rate will permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital," Cable Rate Regulation Executive Summary, Appendix A to the Report and Order, at 17-18, the Commission determined that cable operators may charge rates higher than those based on the benchmarks by demonstrating through a cost-of-service analysis that higher rates are warranted. If an operator chooses this latter course, it subjects itself to the possibility of a determination that its rates should be lower than the benchmarks. Cable operators are now expected to readjust rates to the levels specified by the benchmark analysis by September 1, 1993.

a. The Benchmarks Are Flawed.

Especially in the absence of a meaningful cost-of-service alternative, the importance of the benchmark levels to cable operators cannot be doubted. Yet the benchmarks are based on a seriously flawed methodology. See generally Declaration of William Shew, Director of Economic Studies, Arthur Andersen Economic Consulting, attached hereto as Exhibit H ("Arthur Andersen Declaration"). To establish the benchmarks, the Commission relied on the results

of its survey, as described in Appendix E to the Rate Report and Order. Respondents to the survey did not report cost information. The survey sought only information on prices. Of the 1107 community units for which responses were received, the Commission determined that the 141 of those systems that operated in a competitive environment should be used as the primary basis for the benchmarks. Of these 141 systems, 79 were systems with less than 30 percent penetration, 46 faced actual competition, and 16 were found to be competitive as municipal overbuilds or municipal systems. Only 45 of the 141 systems found to operate in a competitive environment were systems with less than 1000 subscribers; 32 had less than 30 percent penetration; 7 were found to face actual competition; and 6 were municipal systems.

As explained in the Arthur Andersen Declaration at 9-10, "[e]ven the figure of 45 almost certainly overstates the number of cable systems in the database capable of providing a reliable guide to 'competitive' prices." This is so because "[m]arkets involving municipal cable systems and short-term overbuilds cannot be expected to provide a reliable guide to the prices that characterize sustainable competition between private cable systems." Id. at 10. Municipal systems, for example, have significant cost advantages that are not available to private systems. Analysis of the municipal systems in the FCC database has demonstrated that "basic service prices charged by municipal systems are almost 15% below prices charged by competing private systems, other factors equal." Id. at 11.

In addition, six of the seven private small systems found to be facing actual competition have existed for five years or less. "Such short-term competition is typically characterized by price wars during which prices are held below actual cost." Id. at 10. Thus, as the Arthur Andersen Declaration explains, it is likely that the systems facing actual competition are operating near or below cost

in an effort to gain a competitive edge in the short run. Significantly, the Commission made no effort to determine that any of the systems found to be facing actual competition was operating at a profit, or realizing a reasonable return on its investment. Of systems in the Commission's database, however, "in franchises where the duration of competition was five years or less prices were 30% less than in those franchises where competition had endured at least six years." Id. at 12. As noted in the Arthur Andersen Declaration, "[t]he statistical reliability of this difference is extremely high . . . ." Id. Use of such information to determine the benchmark rates does not comport with the statutory command that the Commission should establish reasonable rates.

If the municipal overbuilds and short-term competitive franchises are removed from the Commission's database, "the FCC sample contains only 33 small 'competitive' cable franchises." Id. at 10. Whether the number is 33 or 45 small systems, it is an extremely small sample on which to base the Commission's detailed benchmark tables, which are to be applied to all small systems in the country. For all systems with less than 1000 subscribers, the Commission promulgated ten different benchmark tables, each containing 310 different per channel rates. Thus, on the basis of a survey that included the pricing information for only 45 systems -- and no more than 33 truly competitive systems -- the Commission has established 3100 different per channel rates. These rates apply to the thousands of cable systems in the country with less than 1000 subscribers.

As might be expected given this small sample, individual benchmark tables are in some instances based on exceedingly little information. The two tables (and 620 rates) for cable systems with 500 - 750 subscribers are, for example, based primarily on the survey results from only two competitive systems of that size. Tables for systems with between 750 and 1000 subscribers are based

primarily on the rates of five competitive systems. And tables for systems with 50 to 100 subscribers are based primarily on seven survey respondents.

The fundamental flaws in the benchmark tables adopted by the Commission are most glaringly revealed by the observation that the benchmarks do not accurately reflect the prices that competitive systems are charging. The very idea of the Commission's benchmark pricing, of course, is to reflect the prices that result in a competitive market. As the Arthur Andersen Declaration (pp. 15-16) explains, however, 20 of the 45 small systems found to be competitive by the FCC are charging rates above the benchmark rates; on average, their prices exceeded the prices predicted by the FCC equation by 26 percent. Because these systems are considered competitive, they will not be subject to rate regulation under the 1992 Cable Act. Thus, "noncompetitive" systems -- such as operated by the Petitioners here -- will be required under the benchmarks to charge lower rates than these competitive systems, whose rates are supposed to be reflected in the benchmarks. This is plainly an irrational result.

The Commission is currently faced with multiple petitions for reconsideration of its benchmark rules. 23/ And, while not explicitly disavowing those rules, the Commission has noted that "a number of open issues on implementing rate regulation remain to be resolved." June 30 Letter,attached hereto as Exhibit G. In its June 30 letter to Congress, the Commission stated that "we cannot say that it will be possible to rationally determine what basic rates should be and what refunds would be in order before October 1." Id.

b. The Commission Has Failed to Provide A Viable Alternative To Use Of the Benchmarks.

23/ The Coalition and CATA each submitted a Petition for Reconsideration on June 21, 1993. An additional 51 parties also have sought reconsideration. See 58 Fed. Reg. 36,203 (1993).

Although the Commission itself has recognized that the benchmarks will not permit all cable operators to recover fully the costs of providing service and to continue to attract capital -- and thus to realize the reasonable profit contemplated by Section 623(b)(2)(C)(vii) of the 1992 Cable Act 24/ -- there is not to date any mechanism that provides an alternative to the benchmarks. As of September 1, 1993, a cable operator that believes the benchmark rates are inadequate (and that elects to stay in the cable business) must determine whether to abide by those rates and suffer losses, or to attempt to make a cost-of-service showing. Without any decision regarding the standards that will be applied to the cost-of-service question, however, an operator simply has no basis for determining whether or not it will ultimately be able to make a cost-of-service showing. See Affidavit of Rudolph H. Green, attached hereto as Exhibit A, at ¶ 5 ("Because of the uncertainty of the current situation, Prime Cable is unable to make a rational decision"); Declaration of Dean Wandry, attached hereto as Exhibit B; Declaration of Jay Busch, attached hereto as Exhibit I. As of the effective date of the regulations, therefore, the only certain guide is the benchmarks, which the Commission has acknowledged cannot be lawfully applied to every operator.

Even if final cost-of-service regulations were in place, they would not likely provide a viable alternative for many small systems. First, "many cable

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24/ [W]e cannot be certain that the initial capped rate defined through benchmark comparisons will permit all cable operators to fully recover the costs of providing basic tier service and to continue to attract capital. We do not believe that Congress intended that cable operators could, or should, be compelled to provide basic service [or] tier service at rates that do not recover such costs . . . . Accordingly, we believe that it is acceptable to permit cable operators to exceed the capped rate if they can make the necessary cost showing in certain circumstances.

Rate Report and Order at ¶ 262.